No. 16389

United States Court of Appeals

FOR THE

Ninth Circuit

THE STATE OF NEVADA, EX REL. HUGH A. SHAMBERGER, STATE ENGINEER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX

TABLE OF CASES

CONSTITUTIONS

FEDERAL STATUTES

STATE STATUTES

(NOTE: This action was commenced and tried under the Nevada Compiled Laws of 1929 and Supplements thereto. On January 21, 1957, the Nevada Compiled Laws of 1929 and Supplements were replaced and superseded by the Nevada Revised Statutes. The Appellants' brief bears reference to the Nevada Compiled Laws sections, under which the action was tried. For convenience, this index bears comparable reference between the N.C.L. and the NRS sections cited.)

TEXTS

No. 16389

United States Court of Appeals

FOR THE

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THE STATE OF NEVADA, EX REL. HUGH A. SHAMBERGER, STATE ENGINEER, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE.

APPELLANT'S OPENING BRIEF

STATEMENT

COMES NOW the State of Nevada, Appellant herein, and submits its Opening Brief in a case wherein the matters of fact and of law drawn in issue relate to the ownership, control and administration of the rights to the beneficial consumptive use of water by and between two sovereign entities, the United States of America and a sovereign State of that Union. The issues relate to a subject most vital to the arid regions of the United States, particularly to some seventeen Western States and of great importance to the State of Nevada.

NOTE: The Transcript of the Record on Appeal will be abbreviated and cited herein as R– followed by the page number thereof.

JURISDICTION OF THE COURT

The instant suit was commenced by the State of Nevada on November 30, 1955, by the filing of its complaint in the Fifth Judicial District Court of the State of Nevada, in and for the County of Mineral, wherein the United States was joined as defendant. The purpose of the suit so commenced was to secure a declaratory judgment judicially determining the State's rights, status and legal relations under its laws pertaining to the appropriation to beneficial use of the underground waters of the State by the United States and its government in and upon the United States Naval Ammunition Depot. R–3–19, Complaint for Declaratory Judgment.

The basis of the State Court's jurisdiction to render declaratory judgments was and is Section 1 of "An Act providing for declaratory judgments," approved March 4, 1929, being Section 9440, Nevada Compiled Laws 1929. R–17.

The United States was joined as defendant in the suit pursuant to and by the authority of that certain Act of Congress, approved July 10, 1952, denominated herein "Consent to Suit Act," being found at 66 U. S. Statutes 560, Title 2, and also in Title 43, Section 666, F.C.A., reading:

> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders,

and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

R–17.

Service of Summons and Complaint in the suit was duly admitted by the Attorney General of the United States on December 7, 1955.

Thereafter and on or about December 23, 1955, the defendant United States filed in the District Court of the United States for the District of Nevada its Petition for Removal of the cause from the State Court to the said District Court, which petition was opposed by the plaintiff State in its counter motion to remand filed January 9, 1956. The Petition to Remove was granted May 24, 1956.

After the removal of the suit to the Federal Court and on June 25, 1956, the defendant filed therein its Answer to the State's Complaint so removed from the State Court. R–33–39. Whereupon the issues were drawn for the judicial declaration of the rights of two sovereign entities to the control and disposition of the underground waters in the United States Naval Ammunition Depot.

The removal of the suit from the State Court to the Federal Court did not alter the purport thereof, i.e., the judicial declaration of the State's rights, status and legal relations in and to the underground waters in question. Such right to a declaratory judgment still remains, being sanctioned by the Federal Declaratory Judgments Act, Title 28, Section 2201, F.C.A., reading:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The facts and circumstances of the case at bar discloses beyond any doubt that an actual justiciable controversy existed and exists between the parties herein thus bringing the matter within the Declaratory Judgments Act. It is also to be noted that Rule 57 of the Federal Rules Civil Procedure governing declaratory judgments provides, inter alia, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

STATEMENT OF THE BASIC FACTS

The issues drawn and submitted in the case at bar present a most important matter, especially to the States of the arid West, i.e., which sovereign entity, the United States or a State of the Union is vested with the control for appropriation to beneficial consumptive use by the United States the non-navigable waters, including underground waters, within the boundaries of such State, particularly in view of the enactment by the Congress of the United States the hereinabove quoted Consent to Suit Act in 1952. R–17.

The facts upon which the issues herein are premised are fully set forth in the Record on Appeal, i. e., the Complaint for Declaratory Judgment and Exhibits, R–3–32, Answer and Exhibits, R–33–44, Stipulation of Facts, R–44–56.

The facts briefly summarized disclose:

1. That the land embraced within the area, 200,000 acres, comprising the United States Ammunition Depot was and is a portion of the land ceded to the United States by Mexico under the Treaty of Guadalupe Hidalgo in 1848. R–45.

2. That the Depot lands were included within the Territory of Nevada upon its admission to the Union in 1864 upon "an equal footing with the original States," and were thereafter held by the United States as a proprietor of public domain. R–46.

3. That the Nevada Enabling Act, 32 Stat. 30, enacted by Congress contained a provision whereby the people of the Nevada Territory, upon its admission to the Union, "do agree and declare that they forever disclaim all right and title to the unappropriated public lands within said territory lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States." R–47.

> NOTE: That such disclaimer with respect to the public lands carried with it a disclaimer as to the waters thereon and therein was most definitely disposed of to the contrary in California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 143.

4. That beginning in 1926, and divers times thereafter to 1935, by Executive Orders, the lands comprising the Depot were withdrawn from entry for the purpose of establishing the Depot. R–46.

5. That in 1935 the Legislature ceded jurisdiction over the lands comprising the Depot. R–60.

> NOTE: Nevada alleges, however, that said cession of jurisdiction was over the land only, "but not over the corpus of the water nor the application of its laws providing for the beneficial use thereof." R–4.

6. That in 1939 the Legislature of Nevada enacted a comprehensive Underground Water Act and provided therein for the

appropriation thereof to beneficial use in the manner and form as provided in the General Water Law of 1913, and therein included "United States governmental agency" and the United States as a "person" required to make application to appropriate such waters. R–5–11.

7. That from and after the 15th day of February, 1942, to and including the 15th day of September, 1945, the United States, by and through its officers, caused to be drilled within the Depot some six wells tapping the underground waters therein. Said wells were known as U. S. Navy Wells, Nos. 1, 2, 3, 4, 5 and 6, and the waters thereof were developed for the use of the United States. R–11, 52.

> NOTE: Navy Wells Nos. 2, 3, 4, 5 and 6, occupy the same status as Navy Well No. 1. The issues herein and the decision thereon will relate to those wells to the same extent as to Well No. 1. R–99.

8. That subsequent to the completion of the drilling of said wells and on or about the 29th day of July, 1949, Captain J. S. Crenshaw, for and in behalf of the United States Government, filed in the office of the State Engineer of the State of Nevada an application for permit to appropriate the water, to beneficial use, of each of the Navy Wells Nos. 1, 2, 3, 4, 5 and 6. The said applications were approved by the State Engineer. That thereafter all the provisions of the water laws of the State pertaining to the appropriation of said waters were strictly followed by Captain Crenshaw, and other like officers of the United States, in the perfecting of the rights to the beneficial use of said waters, even to the extent that all that remained to be done was the filing with the State Engineer a simple document, required by law, showing that the waters of the wells had been placed to beneficial use. In fact, the waters had been in beneficial use ever since the

drilling of the wells. Upon the filing of this latter document the Certificate of Water Right would have been issued forthwith by the State Engineer. R–12–15, 20–28, 52–54.

9. That three extensions of time, as provided in the water law for the filing of proof of beneficial use of the waters in question, were sought by the United States and granted by the State Engineer. R–13–15, 28–32. The last extension of time so granted expired July 27, 1955. Prior to such expiration date the State Engineer, in writing, advised Captain W. S. Mayer, Jr., then Commandant of the Depot, of such expiration date and the necessity of either filing proof of beneficial use or the making application for further extension of time within which to so file. Captain Mayer thereupon replied in writing to the effect that upon instructions from the Commandant, Twelfth Naval District, the applications for water rights of said wells were being dropped upon the authority of the ruling of the Supreme Court in the case of Federal Power Commission v. State of Oregon, 349 U.S. 435. R–28–32. (Exhibit "E," annexed to plaintiff's complaint, being the State Engineer's Order issued upon refusal of the defendant to reinstate its applications to appropriate the waters in question.) R–28–32.

10. The town of Hawthorne, County Seat of Mineral County, is situated in and entirely surrounded by the Naval Depot area. Map annexed to Stipulation of Facts. R–40, 99. It was also agreed by counsel for the United States upon the trial that two wells had been drilled by and in the town of Hawthorne tapping the underground water, one well senior in time and one junior in time to the six Navy wells, the waters of which were appropriated according to law, and that the Naval Department had caused the drilling of two additional wells in the area, prior to the trial, for which no applications for permits to appropriate were made.

THE BASIC LAW UPON WHICH NEVADA HEREIN PREMISES ITS PLENARY CONTROL OF THE UNDERGROUND WATERS

Historically and judicially the right to appropriate to beneficial consumptive use the waters in the arid States of the West was developed over a period of many years, pursuant to two doctrines, i.e., the California and the Colorado doctrines. The history of the development of the doctrines and the inception and application thereof is well documented in 1 Wiel, Water Rights, Western States, 3d Ed., Chapters 5, 6, 7, 8, Sections 66–187.

Briefly the basic difference between the doctrines was and is that the appropriator of the beneficial use of the water in California deraigned his title to such use from the United States as owner and proprietor of the public lands, based upon the common law rule of the ownership of the waters by the sovereign, the United States, as allegedly drawn from the Common Law of England.

The Colorado doctrine rejected and rejects such proposition of law and theory. The Colorado doctrine rests upon the foundation that the waters within its boundaries belong to the State as a sovereign or its people, the terms being used synonymously, and subject to appropriation to beneficial use pursuant to its laws, recognizing only the navigation servitude right of the United States.

It is common knowledge that the law of appropriation to beneficial use of water in this country under the rule of "first in time first in right" had its inception in 1848 shortly after the discovery of gold in California. That the primary use of such water was a necessity in the mining of gold. That the miners themselves adopted customs, rules and regulations which to all intents and purposes have been and are now part and parcel of the water laws of the Western States. 1 Wiel, supra, Sec. 73.

The Supreme Court, in Jennison v. Kirk, 98 U.S. 240, (8 Otto 453), decided in 1879, most favorably commented upon the events and the customs and rules of the miners leading up to the establishment of the appropriation doctrine in California and also Nevada in construing Section 9 of the pertinent act of 1866, hereinafter cited. The Court made it clear that the doctrine of appropriation of water to beneficial use was part and parcel of the mining of minerals. The Court in the course of its opinion paid tribute to then Senator Stewart of Nevada, the author of the act of 1866.

The act of 1866, 14 Stats. 85, provided in Section 5, "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise provided by law." This section is now Section 21, Title 30, F.C.A. The act of 1866 was the first act of Congress dealing with the United States' property in minerals and referring to use of water in connection therewith. Such act was the result of the intent of Congress in the first instance to secure funds for payment of the Civil War debt. 1 Wiel, supra, Sections 86, 92, 93, 94. However, the act in fact accomplished far more than the securing of revenue from mining, as stated by Wiel in Section 99:

> The act of 1866 gave the formal sanction of the United States to the prevailing theory of a grant to the holders of existing rights upon public lands, which indeed was its primary object; for the statute had in view chiefly appropriations already made rather than future ones, and the protection of existing rights on the public lands against the United States itself (by the act of 1866) and against its later riparian patentees (by the enactment of 1870) was the primary object. Those rights had been built up in reliance upon the tacit acquiescence of the United States, the true owner of the lands and (*under the assumption of those days*) waters on which appropriations were made, and these

statutes acquiesced therein expressly, "a voluntary recognition of pre-existing rights rather than the establishment of a new one." (Italics supplied.)

In making the foregoing statement, of course, Wiel had no knowledge that the United States Supreme Court would in California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), in construing the Desert Land Act of 1877 broaden his conclusion as to pre-existing rights and extend to the States the right to determine for themselves the future policy with respect to the appropriation of the use of water.

In the course of its opinion the Court said, at pages 162–164:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction.
>
> The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions

of the state of their location. If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States of its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.

* * * * *

Second. Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should contain. For since "Congress cannot enforce either rule upon any state," Kansas v. Colorado, 206 U.S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, insofar as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

The California-Beaver case was followed with approval in Ickes v. Fox, 300 U.S. 82.

It is submitted that historically, if not in fact judicially, the Western law of the right to appropriate water to beneficial consumptive use was initially determined by the rules of the miners and thereafter by the law of the State wherein such right was acquired or sought.

Such is not the status of the law with respect to the ownership, control and the administration of the rights to minerals found upon the public domain. Congress in 1872 enacted a new mining act, found at 17 Stats. 91. This act as stated by the Court in Reynolds v. Iron Silver Mining Co., 116 U.S. 687, became the foundation of the existing mining laws, which said laws are now found in Title 30, Sections 2154, F.C.A. Section 9 of the 1866 act is incorporated in the mining act of 1872, now being Section 51 of Title 30, F.C.A. Said Section 9 provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessions and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. R. S. Sec. 2339.

The Court in McFarland v. Alaska Perserverance Min. Co., 3 Alaska 308, held that:

> This section (Sec. 9) is not only found in the body of the mining acts passed by Congress and classified therewith by statute, as well as by courts and law writers, but next to the right to mine on the public domain it grants to the miners the most valuable incident thereto, the right to use the public waters in mining, which is the very essence of the mineral laws, without which mining could not be made profitable.

The Supreme Court in the California-Oregon v. Beaver Portland case well said at pages 155–156 of 295 U. S.:

The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain. Jones v. Adams, 19 Nev. 78, 86; 6 Pac. 442; Jacob v. Lorenz, 98 Cal. 332, 335–336; 33 Pac. 119.

If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters insofar as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result. That act allows the entry and reclamation of desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, with a proviso to the effect that the right to the use of waters by the claimant shall depend upon bona fide prior appropriation, not to exceed the amount of waters actually appropriated and necessarily used for the purpose of irrigation and reclamation. Then follows the clause of the proviso with which we are here concerned:

"* * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." Ch. 107, 19 Stat. 377.

The right to mine the minerals and the right to the use of water for beneficial purposes most certainly grew out of the customs and rules of the early day miners in the West. As stated by the

Court in the California-Oregon v. Beaver Portland case at page 154:

> The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. Basey v. Gallagher, 20 Wall. 670, 22 L.Ed. 452; Atchison v. Peterson, 20 Wall. 507, 22 L.Ed. 414.
>
> This general policy was approved by the *silent acquiescence of the Federal Government*, until it received formal confirmation at the hands of Congress by the Act of 1866. (Italics supplied.)

Congress, in 1872, pursuant to Article IV, Section 3, of the Federal Constitution, enacted a new comprehensive mining act governing the control of and providing for the acquisition of valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed. Section 1 of that act provided, inter alia, that such mineral deposits "are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Sec. 1, 17 Stats. 91. Title 30, Sec. 22, F.C.A.

Then follows the respective sections of the act expressly setting forth the statutory regulations with respect to the procedure to be followed in acquiring mining property from the United States.

Such act does provide for supplementary legislation not inconsistent therewith by the States and recognizing the local customs and rules of miners.

This act of Congress was closely examined by the Supreme Court in Butte City Water Co. v. Baker, 196 U.S. 119, 49 L.Ed. 409 (1905) wherein the Court held that supplementary regulations concerning the location of mining claims, prescribed by a State in addition to the Congressional regulations, are not invalid on the theory that they were enacted in the exercise of unlawful delegation by Congress of legislative power.

The point is that the United States as far back as 1866 expressly by acts of Congress claimed and established ownership of the valuable minerals upon and in the public lands. That Congress provided by law enacted pursuant to the Property Clause of the Constitution the rules and regulations for the disposal of the property of the United States, granting therein permissive rights to the States and the customs and rules of the miners.

But as to the water and the right to the beneficial use of water, even though such right of use was and is part and parcel of the mining of minerals and had its inception as a branch of the Western mining law, Congress to this day after more than ninety years in acquiescing in the application of the customs, rules and regulations of the miners and the laws of the States thereon, has enacted no law claiming and establishing the ownership over and the promulgation of rules and regulations for the disposal and/or the regulation of water and the right to the beneficial use thereof by any person, entity or State pursuant to the Property Clause of the Constitution or otherwise.

It is conceded that as to the navigable waters of the United States Congress has pursuant to the Commerce Clause of the Constitution legislated as to the use thereof. On the other hand,

it is significant that if in fact the United States owns the non-navigable waters in and upon public lands, Congress has not legislated in the same manner or at all as it legislated for and concerning the minerals and the right to acquire them. In brief, the silence of Congress in this respect is most persuasive evidence it intended that the question of the right to appropriate the waters on and in the public lands to beneficial consumptive use is to be answered and controlled by the laws of the State wherein such right is sought.

CONCLUSION

It cannot well be denied that "the relation of the United States Government to the appropriation doctrine has involved essentially a recognition of State customs and laws upon the subject, as applied to non-navigable waters on the public domain.

The following cases certainly support the foregoing analysis of the inception of the Western law of the appropriation to beneficial consumptive use of the non-navigable waters, including underground waters, based upon the rules and regulation established by the miners, ripening into State control under its laws of the waters within its boundaries, sanctioned and acquiesced in by the Congress over a period of many years.

> Atchison v. Peterson, 20 Wall. 507, 22 L.Ed. 414; Basey v. Gallagher, 20 Wall. 670, 22 L.Ed. 452; Broder v. Natonia Water and Mining Co., 101 U.S. 274; United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 770; Gusterres v. Albuquerque Land & Irrig. Co., 188 U.S. 545; Kansas v. Colorado, 206 U.S. 46; Brush v. Commissioner, 300 U.S. 352.

In addition to the foregoing cases, it is submitted that the Congress over a period of years has enacted many statutes relating

to the beneficial use of the waters wherein the laws of the State governing the appropriation thereof were not only sanctioned but invoked. Citations thereof are included in the Appendix to this brief.

THE WESTERN STATES ADHERE TO THE COLORADO DOCTRINE OF STATE OWNERSHIP AND CONTROL OF NON-NAVIGABLE WATERS

The following States adopted the State or public ownership of water doctrine: Arizona, Section 3280, Rev. Code 1928; Colorado, Constitution, Art. XVI, Sec. 5; Idaho Code, Sec. 42–101; Nebraska, Comp. Stats. 1929, Sec. 1; Nevada, 1903 Stats. Chap. IV, Sec. 1, N.C.L. 1929, Sec. 7890, NRS 533.-025; New Mexico, Constitution, Art. XVI, Sec. 2, 1929, Code Sec. 1510101; North Dakota, 1913 Laws, 8235, as amended 1939 Laws, Ch. 255; Oregon, 1935 Code, Sec. 47–401; South Dakota, 1939 Code, Sec. 61.0101; Texas, Rev. Stats. 1936, Sec. 7467; Utah, Rev. Stats. 1933, Sec. 100–1–1; Washington, Remington Rev. Stat. 7351; and Wyoming, Constitution, Art. I, Sec. 31, Art. VIII, Sec. 1.

Thus fourteen arid Western States, except California in part, have rejected the common law theory of riparian rights and have assumed the plenary ownership and control of all waters within their boundaries, save only as to the navigation servitude of the United States on navigable waters. Long ago the Supreme Court of Nevada rejected, as most unsuitable to its arid condition, the common law riparian doctrine. Jones v. Adams, 19 Nev. 78; Reno Smelting Mill and Reduction Works v. Stevenson, 20 Nev. 269. And In Re Waters of Manse Spring, 60 Nev. 280, declared "that all water within the State, whether above or beneath the ground, belongs to the State."

The recognition of the power of the State to determine which of the conflicting doctrines should prevail was determined in Kansas v. Colorado, 206 U. S. at page 94, holding, "It may determine for itself whether the common law rule in respect to riparian rights or the doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control, Congress cannot enforce either rule upon any state." It is also to be noted that Section 102 of the California Water Code of 1943 provides "All water within the State is the property of the State."

THE SOVEREIGNTY OF THE STATE OF NEVADA

The Proclamation of President Abraham Lincoln admitting Nevada into the Union provides:

> Now, therefore, be it known, that I, Abraham Lincoln, President of the United States, in accordance with the duty imposed upon me by the Act of Congress aforesaid, do hereby declare and proclaim that the said State of Nevada is admitted into the Union on an equal footing with the *original states*. (Italics supplied.)
>
> Proclamation—Marsh—Nevada Constitutional Debates.

Equality of constitutional right and power is the condition of all the States of the Union, old and new.

> Escanaba and L. M. Transp. Co. v. Chicago, 107 U.S. 678; Pollard v. Hagan, 3 How. 212; United States v. Texas, 143 U.S. 621.

In Coyle v. Smith, 221 U.S. 559, the Court said, at page 567:

> The power is to admit new States into this Union. This Union was and is a Union of States, equal in power, dignity and authority, each competent to exert that residuum of

> sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a Union of States unequal in powers, including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an Act of Congress accepted as a condition of admission.

Nevada rejected the riparian doctrine in 1885, in Jones v. Adams, 19 Nev. 78, followed in Reno Smelting Mill and Reduction Works v. Stevenson, 20 Nev. 269. In 1903 Nevada by statute provided that "All natural water courses and natural lakes, and the waters thereof * * * belong to the public." Chap. IV, Sec. 1, Stats. 1903. The Legislature in 1907 re-enacted Section 1 of the 1903 act. Chap. XVIII, Stats. 1907.

Prior to the withdrawal from entry of the public lands now within the boundaries of the Naval Depot in 1926, Nevada adopted the Water Law of 1913, Section 1 of which provides:

> The water of all sources of *water supply within the boundaries of the State, whether above or beneath the surface of the ground, belongs to the public.* (Italics supplied.)

Thus Nevada served notice that the unappropriated water of all sources of supply within the boundaries of the State belonged to the public, i.e., the State. The Supreme Court of Nevada in the case of In Re Waters of Manse Spring, 60 Nev. 280, at page 286, well said:

> We find ourselves in agreement with the argument of appellant that the legislature has declared all water within this state, whether above or beneath the surface of the ground, to belong to the state; that the use of water is authorized by law; and this court has, since the overruling

> of the riparian doctrine in the case of Jones v. Adams, 19 Nev. 78, 6 P. 442, 3 Am.St.Rep. 788, held that there is no ownership in the corpus of the water, but that the use thereof may be acquired, and the basis of such acquisition is beneficial use.

The interpretation given by the highest Court of the State to the various statutes of the State regulating water rights is binding upon the Federal Courts.

> Oklahoma Gas and Elec. Co. v. Wilson and Co. (CCA 10) 54 F.2d 596; Holbrook Irrigation Dist. v. Arkansas Valley Sugar Beet and Irrigated Land Co. (CCA 10), 54 F.2d 840.

There can be no denial that Nevada has since 1885, if not before, adopted and sanctions the Colorado doctrine and applied such doctrine to underground water.

In 1939 the Nevada Legislature by law brought the underground water of the State within the purview of the 1913 general water law. Plaintiff's complaint, paragraph III. R–5. Such law was enacted prior to the drilling of the wells by the Navy Department on and in the Naval Depot. Plaintiff's complaint, paragraph V, R–11, and Exhibits annexed to complaint. R–20–32.

The Nevada Water Law of 1913 and the Underground Water Act of 1939 accorded the United States and the State the same right to appropriate water to beneficial consumptive use as an individual. Paragraph III, plaintiff's complaint. R–5. However, such laws require them to make application to appropriate the waters to beneficial consumptive use in the same manner as is required of an individual. The Legislature of Nevada applied the same requirement to the State and the United States that Congress provided should be applied to the United States pursuant to the language of the Consent to Suit Act, i.e., that the "United States * * * shall be subject to the judgments,

orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances * * *."

CONGRESS IN THE ENACTMENT OF THE CONSENT TO SUIT ACT OF 1952, TITLE 43, SECTION 666 F.C.A. SO LEGISLATED AS TO BRING THE UNITED STATES WITHIN THE PURVIEW OF STATE LAWS RELATING TO THE APPROPRIATION OF THE WATERS OF ANY SOURCE TO BENEFICIAL CONSUMPTIVE USE.

The source of the water, the right to the use of which is the issue in the instant case, is underground water. The Consent to Suit Act uses the term "river system or other source." Section 1 of the Desert Land Act of 1877 (Title 43, Sec. 321, F.C.A.) provides, inter alia, "and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and *other sources* of water supply upon the public lands and not navigable shall remain and be held free for appropriation and use of the public * * *." (Italics supplied.)

The Supreme Court of New Mexico in a well-reasoned opinion concerning the application of the New Mexico statute relating to appropriation of underground water, had occasion to interpret the above-quoted language of the Desert Land Act as applicable to the State act. The Court said:

> The question here is as to the intention of Congress in using the following language "together with the water of all lakes, rivers, and other sources of water supply." Does this include water dedicated to public use by act of 1931? It was the intention of Congress in using the words "other sources of water supply" to cover all water that could be

used and appropriated for beneficial use under the laws of the State where the land is located.

State ex rel. Bliss v. Dority et al., (1950) 225 Pac.2d 1007, at page 1014.

The Consent to Suit Act received exhaustive examination and interpretation by District Judge Hall in Rank v. (Krug) United States, 142 Fed.Supp. 1–186. Such examination and interpretation fills many pages of the Report beginning on page 69, title "Jurisdiction of the United States." A brief summary of the interpretation as applied to the case at bar demonstrates that:

1. It is a suit concerning a justiciable controversy for a declaratory judgment cognizable by the Federal Declaratory Judgments Act as being within the meaning of the word "suit," pages 71, 86.

2. The United States was properly joined as defendant as the owner of or is in the process of acquiring water rights under State law. Page 75 et seq.

3. The act provides adjudication of rights to the use of waters of a river system "or other source." Page 75.

4. The act, waiving sovereign immunity, is not to be given a narrow, restricted, and technical interpretation that will defeat the purposes thereof, i.e., "where broad statutory language is used in a waiver of immunity statute, such as used in Section 666, it is not to be thwarted by unduly restrictive interpretation." Citing Canadian Aviator v. United States, 1945, 324 U.S. 215; United States v. Aetna Casualty & Surety Co., 1949, 338 U.S. 366, also cases in Note 31. Page 80.

5. The purpose of the act on its face was to provide a remedy and a procedure where previously congressionally recognized vested rights could be litigated as against the sovereign and result in a judgment which would be res judicata upon the United States. Page 81, cases cited Note 32. In stating the purpose of

the act, the Court there quoted extensively from the Senate Committee Report No. 755 of Senate Bill 18 (now the Consent to Suit Act) wherein the Committee most definitely reviewed the Western water appropriation law and the prime necessity of providing a remedy to enforce against the United States existing substantive rights. A copy of Report No. 755 is included in the Record on Appeal herein.

The Consent to Suit Act, enacted by Congress, approved by the President, unquestionably is a supreme law of the land. Art. VI, Cls. 2, Constitution. That it was enacted to sanction, invoke and preserve, the water laws of the arid Western States cannot well be denied. To the contrary its purpose so to do is expressly stated in Report No. 755. There the Committee found and stated, "In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof." Page 2. The Committee then considered and quoted with approval from California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, and Ickes v. Fox, 300 U.S. 82, concluding therefrom that "It is therefore settled that in the Western States the law of appropriation is the law governing the right to acquire use, administer and protect the public waters as provided in each such State." Page 2.

The Committee then considered the matter as it affected the United States, saying at page 6, "Since it is clear that the states have the control of the waters within their boundaries, it is essential that each and every owner along a given water course, *including the United States*, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." (Italics supplied.)

"The Committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceedings when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual." Page 6.

It is respectfully submitted that for many years it has been the contention of some of the departments of the Federal Government that the United States owned and controlled the unappropriated waters of the Western States. In Kansas v. Colorado, 206 U.S. 46, 1907, the Attorney General of the United States sought the intervention of the United States upon the ground that the United States possessed exclusive legislative power over the waters of the Arkansas River. The Court denied the right to so intervene upon the constitutional ground that the United States had no such power.

Again, in Nebraska v. Wyoming, 325 U.S. 589 (1945), Federal ownership of the unappropriated waters was asserted. The Court, however, did not expressly, or at all, decide the issue. It simply said, "Though we assume arguendo the United States did own all the unappropriated water, the appropriations under state law were made to individual land owners pursuant to the procedure which Congress provided in the Reclamation Act." Page 615. That the Court only assumed arguendo is distinctly pointed out by Justice Douglas in his dissenting opinion in Federal Power Commission v. Oregon, 349 U.S. 435. It is submitted that the Supreme Court has not yet declared ownership of any such waters in the United States.

It is further submitted that Congress, in and by the enactment of the Consent to Suit Act in 1952, not only has waived the immunity of the United States as a sovereign to be made a defendant in a suit to determine its rights to the beneficial use of the

waters of a State of the Union above or beneath the surface of the ground, but has also expressly provided that the United States shall be deemed to have waived any right that the State laws relating to the appropriation of said waters are inapplicable and/or that the United States is not amenable thereto. In brief, Congress has most definitely approved and reaffirmed the doctrine of the applicability of State laws governing the right to appropriate to beneficial use the waters of the State as developed and laid down in the California-Oregon v. Beaver Portland case, and in so doing made the United States amenable to such doctrine.

And, further, Congress is vested with full legislative power over the property of the United States, including the public domain, and empowered to make all needful rules and regulations concerning it. Art. IV, Sec. 3, Cls. 2, Constitution. And such legislative power is without limitation. Alabama v. Texas, 347 U.S. 272.

As pointed out hereinbefore, even if it was or is the fact that the United States owned the non-navigable waters in and upon the public domain, Congress for ninety years and more not only acquiesced in the application of the rules of the miners and the subsequent State laws governing the appropriation to beneficial use such waters, but also, during all of that time, enacted and promulgated no rule or regulation respecting the securing of a right to the use thereof by any person, State or entity. In brief, Congress was content that the laws of the State in this respect provided speedy and more equitable apportionment to beneficial use of the life-giving waters of the arid West, and in 1952 made a rule and regulation that the United States, when the owner of or in the process of acquiring a water right by appropriation under State law, shall be amenable to that law.

In the instant case there is no denial that the United States was in the process of acquiring a water right by appropriation under State law.

The evidence is conclusive that the United States, by and through its officers, had complied strictly with the Nevada water law governing the appropriation of underground water and had put the water to beneficial consumptive use with the entire approval of the State Engineer, the State administrative officer. All that remained to be done to perfect the title to the water right was the filing with the State Engineer a document specifying that such water had been put to beneficial use, upon receipt of which the State Engineer would have caused the recording of such document in the Office of the County Recorder, thus giving public notice of the perfecting of such water right. R–11–16, 31–32.

Upon notice given by the State Engineer, after three extensions of time within which to file the proof of putting the water to beneficial use had theretofore been granted, that such documentary proof must be filed or further extension of time therefor be requested, the permits to appropriate the waters would be cancelled, Captain Mayer, Jr., Commandant of the Naval Depot, replied that the applications for water rights of the Navy wells were being dropped upon instructions from the Commandant of the Twelfth Naval District based on a recent ruling of the Supreme Court in Federal Power Commission v. Oregon, 399 U.S. 435. R–29–31.

It is clear that the only ground for the refusal of the officers of the United States to perfect the appropriative right to the waters in question was and is the decision of the Court in Federal Power Commission v. Oregon, known as the Pelton Dam Case.

The Pelton Dam Case

The Court below in the case at bar discussed the foregoing entitled case and then said, "At worst, the Pelton Dam case is highly persuasive authority in the instant case. At best, it is determinative. This Court is inclined to the latter view." R–76.

The question is, is the said case determinative of the issues in the case at bar. The Appellant asserts that it is not for the following reasons:

1. That no issue was there raised relating to the appropriation of water to beneficial consumptive use by any party, including the Federal Power Commission, under State law or otherwise. In fact such issue could not have been raised because of the provisions of Section 27 of the Power Act reading:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Certainly, by the use of such language Congress was even then cognizant of and reserving to the States the control of the appropriation rights according to their laws.

2. The case at bar deals directly with the right of appropriation to beneficial consumptive use of water pursuant to State law. The paramount issue is, does the Consent to Suit Act mean what the language thereof imports, i.e., when the United States is joined as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source, for the administration of such rights where it appears that the United States is the owner of, or in the process of acquiring, water rights under State law—shall be deemed to have waived any right to

plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

That issue was not before any Court in the Pelton Dam Case. The Consent to Suit Act was not invoked nor mentioned by any party in that case. Here the very foundation of the case is laid by a supreme law of the land enacted by the Congress, a legislative body possessing the constitutional power to so legislate. Said act contains no provision limiting its effect to public lands as distinguished from reservations or any other form of use or ownership of land. In brief, this point was well summarized by the Supreme Court in Leather Mfrs. National Bank v. Cooper, 120 U.S. 778:

> A suggestion was made in argument that the case is one arising under the laws of the United States for the reason the cause of action is identical with that sued on in Leather Manufacturers' National Bank v. Morgan, 117 U.S. 96, decided by this Court at the last term, and in which the principles of law which govern the rights of the parties were determined. Nothing of the kind, however, appears in the record, *and if it did it would not authorize a removal. This is not that suit, and a case does not arise under the laws of the United States simply because this Court, or any other Federal Court, has decided in another suit the questions of law which are involved.* (Italics supplied.)

It is submitted that the conclusion of law is, that the Pelton Dam Case is not determinative of the case at bar.

CONCLUSIONS RE. OPINION AND DECISION OF THE DISTRICT COURT

R–57–83, 165 Fed. Supp. 600

I.

THE SOVEREIGNTY OF THE UNITED STATES

The opinion of the Lower Court discloses only a meager interpretation of the Consent to Suit Act. That Court placed strong reliance upon the sovereignty of the United States as interpreted by Chief Justice Marshall in McCullock v. Maryland, and as interpreted in the Ivanhoe Water District Cases, and United States v. Public Utilities Commission of California Case. R–67–70, 76–77, 78–81.

The Appellant does not contend that said cases do not state the Appellate Courts' view of sovereignty as therein set forth. However, it is axiomatic that in the interpretation of a Court's opinion the thought must be kept in mind the facts and circumstances upon which the case arose, and also the state of the law applicable thereto. In none of those cases did the facts and circumstances parallel or approach the facts and circumstances of the case at bar. In brief, said cases are of no more controlling effect here than the Pelton Dam Case hereinabove distinguished.

The Appellant is not seeking to impugn the sovereignty of the United States. It recognizes and supports the well-grounded theory of the law of the supremacy of the Appellee, and agrees that in all matters constitutionally within the ambit of its powers are beyond the reach of state power, unless otherwise provided by an Act of Congress.

It may well be that had the Appellee at the inception of its public land policy in the Western States applied the same or similar rules, regulations and statutory provisions with respect to the

waters therein as it provided for the minerals thereof, that a totally different system of the control of such waters would have been effected and the sovereign powers of the Appellee thereover retained.

However, as pointed out hereinbefore, the Courts, and the Congress by legislation, have in fact confirmed and settled the State ownership and control of the non-navigable waters of any source for beneficial consumptive use within its borders. That the Congress believed the State water laws well served to equitably protect and apportion the beneficial use of the waters cannot well be denied, to the contrary it provided by statute that the United States should be amenable thereto.

It is further to be noted that the Consent to Suit Act is not the only expression of the will of Congress that the water laws of the Western States are to be the rule of decision with respect to the appropriation and use of the waters of such States by respective departments, bureaus and officers of the United States. Many of the Congressional Acts covering a period of many years so providing are cited in the Appendix to this brief.

The Appellant is of the opinion that in this case the Lower Court gave undue weight to the sovereignty of the Appellee. That it failed to give due consideration to the Water Appropriation Laws of the State and the effect thereof as applied to the Appellee pursuant to the provisions of the Consent to Suit Act.

It is common knowledge, of which it is submitted this Court may take judicial notice, that the appropriative rights to the beneficial consumptive use of waters in the arid West are interlocking in character. Each individual use is a detriment to a like use by another individual use. These uses must be coordinated so that all of the users of available water may receive their allotted shares. To accomplish this, the Western States enacted their respective laws in order that the public waters so necessary to the economic

welfare of such States be allotted in as equitable manner as possible. The Supreme Court in Pacific Live Stock Co. v. Oregon Water Board, 241 U.S. 447, well said of such laws:

> "* * * All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators."

It needs no citation of authority to show that any individual or entity entering a State and there appropriating and using the waters of the State without complying with the laws of that State is certainly using such waters to the detriment of those possessing the legal right thereto through compliance with the law. And if such individual or entity may do so with impunity and continue such use, then indeed the result will be, as aptly stated by the Senate Committee in Report No. 711, page 5: "If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i.e., the necessity that public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof."

As pointed out hereinbefore, in 1939 Nevada adopted a comprehensive Underground Water Appropriation Act for the very purpose of conserving such waters and providing therein the same

method of securing the appropriative rights to the beneficial consumptive use thereof that appertained to surface waters. In brief, establishing order in lieu of chaos with respect to underground waters that it had long ago established for surface waters.

It is submitted that Congress used most significant language in the composition of the Consent to Suit Act when it said, "The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State Laws are inapplicable or that the United States is not *amenable thereto by reason of its sovereignty* * * *." (Italics supplied.) Sovereignty alone of the United States is not the criterion upon which to base the inapplicability of the State Laws.

II

THE STATE OF NEVADA DID NOT CEDE TO THE UNITED STATES JURISDICTION OVER AND CONCERNING THE STATE-OWNED WATERS WITHIN THE NAVAL DEPOT AREA.

The Nevada Act ceding jurisdiction (R. 51, 61) provides that the State "hereby cedes jurisdiction to the United States upon and over the land and within the premises of that certain area, situate near Hawthorne * * *." There is no mention there nor elsewhere in the Act of the ceding of jurisdiction over the property of the State.

As pointed out hereinbefore in this brief, long years before the establishment of the Naval Depot, Nevada adopted the State ownership of the waters of the State above and beneath the surface of the ground based upon the law as sanctioned with approval by the Supreme Court of the United States. Not only did the State claim ownership by reason of well established law, but

provided the means by which the use of its property could not only be acquired, but also, be protected from undue infringement thereof.

It is to be noted, however, the Lower Court did not rely upon the cession of jurisdiction act as relinquishing State control of the waters in question. The Court after quoting the act said, "in view of the stipulation, supra, that 'full title' to the land in question has been in the defendant at all times since the cession by Mexico in 1948, reliance on Nevada's cession is unnecessary." R. 66. Thus the Lower Court adverted to the Federal ownership of waters by reason of its ownership of lands as disposing of the issue, irrespective of the weight of the law to the contrary.

Adverting to the cession act it is the position of the Appellant (1) that the underground waters in question were and are the property of the State, (2) that said waters were subject to the right of appropriation to beneficial use by the United States pursuant to State Law, (3) that the disposal of the ownership or control of State owned property can be had only upon the State legislative authorization therefor.

The lands comprising the Naval Depot were not acquired by the United States in the first instance for any of the purposes provided in Article I, Section 8, Clause 17, the exclusive jurisdictional provision of the Federal Constitution. Neither were such lands purchased by the United States with the consent of the Nevada Legislature, nor did the United States in 1864 reserve any portion of such lands for military or other purpose save that of a proprietor, with the right to dispose of the unappropriated public lands as provided in Section 4 of the Nevada Enabling Act.

It has long been settled law that where the public lands of the United States within a State are not acquired or reserved as above stated that it is incumbent upon the United States to secure

cession of jurisdiction from the State if any or some exemption from State control is desired.

> Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525; Chicago Rock Island and Pac. Ry. Co. v. McGlinn, 114 U.S. 542.

The question is—did the Nevada Legislature in 1935 cede Nevada's jurisdiction and plenary control of waters above and/or beneath the surface of the lands within the Naval Depot to the United States?

Statutory grants by the Legislature, where sovereign power is delegated or where it is sought to derogate from sovereign authority, are construed strictly against the grantee.

> Black, Interpretation of Law, 2d Ed. 499; Six Companies v. Devinney, 2 Fed.Supp. 693, D.C. Nevada, construing Nevada Act of 1921 ceding jurisdiction to United States, Secs. 2895–2898 N.C.L. 1929. Larson v. South Dakota, 278 U.S. 429.

The act ceding jurisdiction to the United States was and is in derogation of Nevada's sovereignty, and being subject to strict construction conveys no title to its property, particularly where Nevada theretofore, by a public act of its Legislature, imposed restrictions upon the alienation of its property. Where, as here, such property is the State owned water and subject to appropriation to beneficial consumptive use only pursuant to its water appropriation laws.

> "If a state, by a public act of its legislature, imposes restrictions upon the alienation of its property, every person who takes a transfer of such property must be held affected by notice of them. Alienation in disregard of such restrictions can convey no title to the alienee."
>
> 49 Am.Jur. 272, Sec. 58; Texas v. White 7 Wall (U.S.) 700, 19 L.Ed. 227.

It is respectfully submitted that the record in this case shows beyond question that the officers and representatives of the United States were cognizant of and were affected with notice of the restrictions on the alienation of Nevada's property in the waters in question, and that they were endeavoring to comply strictly with such restrictions.

III

THE PLENARY CONTROL OF THE NAVAL AMMUNITION DEPOT BY THE UNITED STATES DOES NOT CONSTITUTE "EXISTING RIGHTS" TO THE BENEFICIAL CONSUMPTIVE USE OF THE UNDERGROUND WATERS WITHIN THE MEANING OF THAT TERM IN THE 1939 UNDERGROUND WATER ACT.

The Lower Court was of the opinion that Section 1 of the Underground Water Act of 1939 providing, "All underground waters of the State belong to the public, and subject to all existing rights to the use thereof, and subject to appropriation for beneficial use only under the laws of the State," recognized as "existing rights" of the United States by reason of the "full title" to the lands of the Depot being in the United States since the cession from Mexico. R–66.

The Appellant dissents from such view for all of the reasons hereinbefore in this brief set forth. Briefly, that the waters above and beneath the surface of the ground in this State constitute property of the State and are subject to appropriation to beneficial consumptive use pursuant to its laws. And further, that the Congress in the Consent to Suit Act provided that the United States

"shall be deemed to have waived any right to plead that the State laws are inapplicable."

Section 9 of the 1939 Underground Water Act, provides:

> "A legal right to appropriate underground water for beneficial use from an artesian well or from a definable aquifer by means of a well, tunnel, or otherwise drilled, bored, or otherwise constructed subsequent to March 22, 1913, or from a well, tunnel, or otherwise tapping percolating water, the course and boundaries of which are incapable of determination, that was drilled, bored, or otherwise constructed subsequent to March 25, 1939, can only be acquired by complying with the provisions of the general water law of this state pertaining to the appropriation of water."

This statutory provision clearly defines the meaning of "existing rights" theretofore contained in the language of Section 1 of the act, i.e., "subject to all existing rights of the use thereof." R–5. In brief, that the beneficial consumptive use of waters developed from an artesian well, or developed from a definable aquifer by means of a drilled well, tunnel or other method prior to March 22, 1913, constitutes an existing right within the meaning of the term. Likewise, the use of waters developed from a well, tunnel, or other method tapping percolating water the course and boundaries of which are incapable of determination prior to March 25, 1939, constitutes an existing right within the meaning of the term.

The Navy wells in question were drilled from on and after February 15, 1942, to and including September 15, 1945. R–11, 52, 62. And were so drilled after the enactment of the Underground Water Act in 1939.

The said wells were not drilled on any area of land theretofore designated by the State Engineer as a basin containing underground waters. They were, however, drilled in accordance with the provisions of Section 6 of said act relating to the sinking of

wells in basins that had not theretofore been designated as an underground basin, reading:

> "In other basins or portions therein which have not been designated by the state engineer as aforesaid where the water sought to be (4) appropriated is underground water existing in unconfined aquifers and not being under any hydrostatic artesian pressure, no application or permit to appropriate such water is necessary until after the well is sunk or bored and water developed. Before any legal diversion of water can be made from said well the appropriator must make application to the state engineer in accordance with the provisions of the general water law of this state for a permit to appropriate such water."

This fact was alleged by plaintiff in paragraph III of the Complaint. R–6, 12.

Further, after completion of the wells and in accordance with the provisions of the aforesaid Section 6, and accompanying State laws, the Officers of the United States made due applications for permits to appropriate the waters developed in and by said wells. R–12–15, 52–54.

It may well be that had the United States caused the drilling of the said wells to completion prior to March 25, 1939, such wells may *then* have become "existing rights," within the meaning and intent of the law.

THE NATIONAL DEFENSE ASPECT OF THE CASE
R–78–82, 90

The Lower Court in its opinion and conclusions of law, stressed the National Defense Powers of the United States as the compelling reason for the dismissal of the action. The Appellant has no

quarrel with such powers, nor the grounds upon which they are premised. However, the record here fails to disclose any substantial basis upon which it is or can be claimed such powers were or would be endangered by reason of the State laws in question.

The uncontradicted evidence herein is most clear that upon the completion of the drilling of the Navy wells that the Officers of the United States diligently made application to appropriate to beneficial use the waters thereof in strict accordance with the laws of the State, and perfected such applications clear to the point where there only remained one simple step to be taken to perfect the unquestioned title to the right of use.

Further, it is not unreasonable to assume that the Officers of the United States in the perfecting of the right to the use of the waters in question in accordance with the laws of the State were not unaware of the National Defense Powers of the Nation. Certainly they were imbued with it. But, be that as it may, the Naval Department of the United States dropped the applications for permits for the water rights in question upon the rule of the Supreme Court in the Pelton Dam Case, not upon the ground of interference with the National Defense Powers.

There is no evidence herein that the powers of the United States for any purpose in the use of the waters, or otherwise, had been, were, or would be interfered with by the State and/or its officers. The rights to the use of the waters of the Navy wells, when perfected, would have been senior in time to all except one well within the town of Hawthorne, and, of course, senior in time to any subsequent wells in the same area surrounding the Depot area hereafter drilled. Not without reason has the Appellant hereinbefore shown interlocking character of water rights.

SENIORITY OF RIGHT TO THE BENEFICIAL CONSUMPTIVE USE OF THE WATERS OF NEVADA WAS AND IS PREMISED UPON THE RULE "FIRST IN TIME FIRST IN RIGHT" LONG AGO ADOPTED BY THE WATER LAWS OF THE WESTERN STATES.

The Supreme Court of Nevada in Lobdell v. Simpson, 2 Nev. 274 (1866), held that as between persons claiming rights to the use of the water by appropriation, the one "has the best right who is first in time."

Subsequent to the Lobdell case the doctrine of riparian rights was recognized by the Nevada Courts in some cases. However, in 1885 the matter was set at rest in the case of Jones v. Adams, 19 Nev. 78, by the Court holding that the riparian doctrine did not serve the wants and necessities of the people for either mining or agriculture, and that in consequence the doctrine of prior appropriation had been universally applied. Since 1885 the riparian doctrine has not been the rule of decision. The Legislature of Nevada long ago by statute has made the law of appropriation the guiding principle, and wrote such principle into the Underground Water Act of 1939.

Said Act was also enacted upon another principle of water law pertaining to the use of underground waters, i.e., the "American Rule" or "Doctrine of Reasonable Use and Correlative Rights." This rule is well stated in 56 Am.Jur. 596, Sec. 114. Appellant quotes in part:

> "While the common-law or English doctrine has, as already seen, been followed in most of the early decisions in this country, and is still adhered to in some states, its

> soundness has been challenged on the ground that the doctrine of absolute ownership is not well founded in legal principles, and is not so commended by its practical application as to require its adoption, and that the better rule is that the rights of each owner being similar, and their enjoyment dependent on the action of other landowners, their rights must be correlative and subject to the maxim that 'one must so use his own as not to injure another,' so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of the similar rights of others."

Such rule was well sustained in Snake Creek Min. and Tunnel Co. v. Midway Irr. Co., 260 U.S. 596.

The very essence of the Law of Appropriation of Water with respect to the availability thereof for use is the priority of right. Such right in Nevada is granted and protected by the law. The senior appropriator is entitled to insist upon the fulfillment of his right, both as to surface and underground waters. Under Nevada law the State Engineer is the officer of the State charged with the duty of administering its water laws in accordance with the priorities of right.

The State Engineer, inter alia, is even vested with the power to restrict the drilling of wells in any underground basin or portion thereof where it appears that additional wells would unduly interfere with existing wells. Sec. 10, Underground Water Act.

It needs no citation of authority to show that in the arid Western States the increased beneficial consumptive use of the waters deplete the available supply thereof both above and beneath the surface of the ground.

The evidence in this case is that the rights to the beneficial consumptive use of the waters developed in the Navy Wells were rights senior in time to all wells in the near vicinity of the Naval

Depot area except the one well of the Town of Hawthorne. All other wells drilled thereafter would be accorded rights junior to those of the Naval Wells, provided, of course, the Naval Wells' rights had been perfected in accordance with the State law, and thus be entitled to the protection of those rights as against the junior appropriators.

The seniority question is of grave importance. It is common knowledge that the arid West, including Nevada, is the only area left in the nation whereby the great increase in population can find lands upon which to establish homes, farms, ranches and industrial projects. Water of all sources of supply is vitally necessary for these purposes.

In this case the Officers of the United States were well on the road to establish the priority rights to the use of the waters of the wells in question pursuant to State law, but dropped the matter just short of perfecting the title to such priority of use.

It is clear that no priority of use of the waters in question was established under State law. If not so established, then when such priority of use is or may be questioned by any interested party whose right to the beneficial consumptive use of the waters of the same or adjacent underground basin was or is perfected under the same State law, is curtailed or jeopardized by the use of the Navy Wells, what law will then be the rule of decision?

Thus the circumstances of this case presents questions of far reaching effect, not alone as to the effect thereof upon the rights to the beneficial consumptive use of the waters of the Navy Wells, but of more importance, the effect upon the future administration of the waters of a sovereign State of the Union in cases where the United States claims the right to the use of such waters premised upon the sovereignty of the United States. Particularly is this true in view of the explicit language of Congress in the Con-

sent to Suit Act, that in any such case the United States shall be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.

THE APPELLANT'S STATEMENT OF POINTS RELIED UPON (R. 94–97) HAVE BEEN COLLECTIVELY TREATED HEREIN.

This case was tried upon the pleadings and an agreed stipulation of facts, consequently there is no assignment of errors pertaining to the introduction of evidence. In brief, the issues herein were issues of law as applied to the facts. The points relied upon by Appellant were and are combined and merged in their entirety in the Lower Court's construction and interpretation of the law of the case. The Lower Court in such interpretation concluded as a matter of law that Appellant's construction thereof was erroneous and ordered dismissal of the action. R. 88–91.

The Appellant has hereinbefore fully stated its conception of the law of the case. The basic, in fact the true issue, before the Lower Court and here, is the sovereign control of non-navigable waters within the boundaries of a State of the Union, as developed over a period of ninety years pursuant to State law sanctioned by the Courts, including the Supreme Court of the United States, and concurred in by Congressional legislation, all as hereinbefore set forth.

The Appellant therefore respectfully submits that the decision and judgment of the United States District Court was erroneous and not in accord with law.

CONCLUSION

Appellant respectfully submits, in view of the fact that for ninety years and more the Western States have labored to bring order out of chaos with respect to the beneficial use of the waters thereof pursuant to their respective laws, acquiesced in and sanctioned by the Congress of the United States, and also by its Courts, even sanctioning the State ownership thereof, that to preserve such order, the Appellant is entitled to a judgment, declaratory in character, sustaining its interpretation of the law.

Respectfully submitted,

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APPENDIX

FEDERAL STATUTES RECOGNIZING STATE LAW AS THE BASIS OF WATER RIGHTS

The following Congressional enactments are a number of those statutes relating to the beneficial use of waters wherein the laws of the State governing the appropriation thereof were invoked, and they are collected here, prefaced with the reminder from United States v. Jefferson Electric Manufacturing Co., 291 U.S. 386, 396.

> "As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown."

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. sections 372, 383 (1952) provides:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be

appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Of like import, in connection with the State control of the distribution of water, are: Section 17 of the Act of July 9, 1870, 16 Stat. 218, 43 U.S.C. 661 (1952); Section 1 of the Desert Land Act of March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C., section 321 (1952); Section 18 of the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C., section 946 (1952); Act of February 26, 1897, 29 Stat. 599, 43 U.S.C., section 664 (1952); Act of March 2, 1897, 29 Stat. 603; Act of June 4, 1897, 30 Stat. 36, 16 U.S.C., section 481 (1952); Section 25 of the Act of April 21, 1904, 33 Stat. 224; Section 4 of the Act of February 1, 1905, 33 Stat. 628, 16 U.S.C., section 524 (1952); Act of March 3, 1905, 33 Stat. 1020; Act of June 21, 1906, 34 Stat. 375; Act of March 1, 1907, 34 Stat. 1035; Act of May 30, 1908, 35 Stat. 560; Act of March 3, 1909, 35 Stat. 812; Section 2 of the Warren Act of February 21, 1911, 36 Stat. 926, 43 U.S.C., section 524 (1952); Section 11 of the Act of December 19, 1913, 38 Stat. 250; Federal Power Act of June 10, 1920, 41 Stat. 1068, 1077, 16 U.S.C., sections 802 (b), 821 (1952); Section 18 of the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1065, 43 U.S.C., section 617q (1952); Section 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1271, 43 U.S.C., section 315b (1952); Section 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940, 54 Stat. 779, 43 U.S.C., section 618m (1952); Section 3(b) of the Great Plains Water Conservation and Utilization Projects Act of October 14, 1940, 54 Stat. 1121, 16 U.S.C., section 590z–1(b) (1952); National Parks Act of August 7, 1946, 60 Stat. 885, 16 U.S.C., section 17j–2 (1952); Section 3(e)

of the Submerged Lands Act of May 22, 1953, 67 Stat. 31, 43 U.S.C., section 1311(e) (Supp. V, 1958); Section 3(c) of the Act of July 28, 1954, 68 Stat. 577–78; Section 4 of the Act of August 4, 1954, 68 Stat. 667, as amended by 70 Stat. 1088 (1956), 16 U.S.C., section 1004 (Supp. V, 1958); Section 4(b) of the Act of July 23, 1955, 69 Stat. 368–69, 30 U.S.C., section 612(b) (Supp. V, 1958); Section 7 of the Colorado River Storage Project Act of April 11, 1956, 70 Stat. 110, 43 U.S.C., section 620f (Supp. V, 1958); Section 4 of the Act of July 2, 1956, 70 Stat. 484, 43 U.S.C., section 485h–4 (Supp. V, 1958); Section 4(b) of the Small Reclamation Projects Act of August 6, 1956, 70 Stat. 1045, 43 U.S.C., section 422(b) (Supp. V, 1958); Section 202 of the Act of August 28, 1958, 72 Stat. 1059.